No. 35

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

TOM C. CLARK, ATTORNEY GENERAL, As Successor to the Alien Property Custodian, *Petitioner*,

v.

UEBERSEE FINANZ-KORPORATION, A. G., *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

SECOND SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENT.

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Since the argument had in this case in May of this year, two significant decisions in respect of the question involved have been handed down in the Second Circuit.

The first is *Swiss Bank Corporation* v. *Clark, Attorney General, as Successor to the Alien Property Custodian*, D. C. So. Dist. N. Y., Civil Case No. 32-570, unreported, decided on August 15, 1947. In this case the problem involved was substantially identical to that which gave rise to the dictum in *Silesian-American Corp.* v. *Markham*, 156 F. 2d 793, 797, cert. granted Feb. 7, 1947, No. 6, this Term, which dictum is to the effect that the remedy of a friendly foreign national whose property rights have been invaded by a seizure by the Alien Property Custodian is not by suit

under § 9(a) of the Trading with the Enemy Act, but rather through suit for just compensation in the Court of Claims. In the Swiss Bank case the plaintiff was a Swiss national and the pledgee of certain shares of stock as collateral for a money loan. The stock seized was that issued by certain corporations in this country, which stock was alleged by the Government to be owned by certain enemies, the pledgors thereof to the plaintiff bank. The Custodian, having vested such stock, the Swiss Bank sought to recover its possession by suit under § 9(a). The Government moved for judgment on the ground that the plaintiff was, on the pleadings, a foreign national and therefore disabled from suing under § 9(a). The court denied the motion, holding that plaintiff could sue under § 9(a) and that the *Silesian-American* decision, *supra*, was not controlling. Because the decision is unreported, it is printed in full in the appendix hereto.

The second case—of acute significance because decided by the same Circuit Court of Appeals which issued the opinion in the *Silesian-American* case—is *Standard Oil Company, et al.* v. *Markham*, CCA 2, decided September 22, 1947, (as yet unreported), on appeal from *Standard Oil* v. *Markham*, 64 F. Supp. 656. A recital of the rather lengthy set of facts is for present purposes unnecessary. It is sufficient to state that the question arose upon the facts as to whether plaintiff became a foreign national within the meaning of Executive Order 8785, § 5E iii (Petitioner's main brief, pp. 79-82), and as such foreign national disabled from suing under § 9(a) of the Trading with the Enemy Act.[1] This problem is discussed by the Court under Point 4 of its Opinion in the following language:

> 4. *Plaintiffs' Right to Sue.* As American corporations, the plaintiffs' right to bring suit to recover their property from the Custodian is, on its face, within the specific authorization of §9(a) of the Trading with the Enemy Act, 50 U. S. C. A. Appendix, §9(a). Neverthe-

[1] It is by virtue of this same Executive Order that the plaintiff in the instant case is placed in the category of a foreign national.

less, a question as to that right arises in view of the 1941 amendment to §5(b) of the Act. Previous to the amendment, §7(c) of the Act had authorized the vesting of property owned or held on behalf of enemy nationals; the 1941 amendment to §5(b) authorizes the vesting of property of all foreign nationals, whether enemy or not. Defendant claims that this amendment by necessary implication destroyed the right granted by §9(a) to nationals of friendly foreign powers to sue to recover seized property. If this were so, the plaintiffs' right to proceed here might be brought into direct question because of Exec. Order 8785, §5E(iii), 3 CFR, Cum. Supp., 948, 6 F.R. 2897. That order, for some purposes under the Trading with the Enemy Act, includes in the definition of foreign nationals any persons to the extent that they acted directly or indirectly for the benefit, or on behalf, of a foreign national.[a]

Thus there are two steps to the argument before its conclusion is reached. Taking these up in order, it is clear that there is an ambiguity in the Act which must be—and apparently soon will be—resolved by the Supreme Court. In *Uebersee Finanz-Korporation, A. G.*, v. *Markham*, App. D. C., 158 F. 2d 313, the court, one justice dissenting, reversed the decision of the district court in favor of the Custodian, to uphold the right to sue. On grant of certiorari, the case was argued in the Supreme Court in May, but has now been restored to the docket for reargument in the fall. *Clark* v. *Uebersee Finanz-Korporation, A. G.*, 67 S. Ct. 1749. A like order for reargument was made in the companion case of *Silesian American Corp.* v. *Clark*, 67 S. Ct. 1748, on review of our decision in *Silesian American Corp.* v. *Markham*, 2 Cir., 156 F. 2d 793.[b] The parties have furnished us with the briefs on the issue as pre-

[a] Though defendant does not make the argument, it would seem possible to contend that, under this extensive definition, plaintiffs became enemy nationals after the outbreak of war, since their concealment of I. G. assets continued thereafter. Such an argument would not require restricting the scope of § 9(a).

[b] Notwithstanding some interpretation of this case as full support for the Custodian's position, *cf.* 56 Yale L. J. 1068, it does not go so far; for only at issue was the question whether a claimant had some remedy in some court, thus making unjustified the refusal of a corporation to transfer stock on its books to the Custodian.

sented to the Supreme Court, and these have been helpful.

The opposing points of view are stated in the two opinions of the Court of Appeals in the *Uebersee* case. The plaintiffs' point of view is that the amended §5(b) is not to be treated as an amendment by implication of §9(a), but that the statutes must be read together and each given effect. So considered, the effect of the change in law is to enable the government to meet the real evil of the cloaking of enemy property interests by apparent holdings by nationals of friendly powers. Seizure is permitted against such nationals, who can then secure a return only upon showing that the property is genuinely their own. While their suits were pending, title to the vested property would be *prima facie* in the Custodian, pursuant to §5(b). Limitation of the amendment thus to procedure is urged as a natural interpretation, particularly in view of the constitutional difficulties attendant upon an interpretation that the amendment took away the right of nationals of friendly foreign powers to sue. By §7(c), the remedy of claimants under the Act is made exclusive; and hence the amendment if thus interpreted would be subject to attack as confiscatory. Moreover, the Custodian has failed to secure such legislation from Congress; indeed the Senate in 1946 struck out a provision from a pending bill in order "to eliminate the proposal to cut off the right of a friendly foreign national to sue for and obtain the return of his property under Section 9(a)," Sen. Rep. No. 1839, 79th Cong., 2d Sess., and the bill as thus amended became law on August 8, 1946. 60 Stat. 925, 50 U. S. C. A. Appendix, §33.

Defendant, however, contends that this is too limited effect to give to an important amendment, granting the President power to vest such property in an agency or person, and "upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States." He says that there are no constitutional difficulties, because a claimant of a friendly nation has a right to recover just compensation in the Court of Claims for any property taken, that the restriction of remedies by §7(c) is only of those for return of the "property" not of compensation for its

use, and that his administration of enemy assets will be vastly hampered if he cannot sell or otherwise make use thereof until it has been determined that no part is to be returned to nationals of friendly countries.

Were we forced to a final decision at this time, we should be content to accept the precedent of the decision in the Court of Appeals on the grounds ably stated by Chief Justice Groner. The power of seizure and confiscation, particularly as against a friendly alien, is so drastic and so novel that we think it should not be extended beyond bounds clearly set. The concession of a remedy in the Court of Claims tends to support this view. While the practical advantages to the Custodian of the restricted remedy are obvious, yet it hardly seems that Congress would have taken an apparently drastic step in international law only to achieve indirectly this merely procedural change. *Cf.* 56 Yale L. J. 1068.

But even if the defendant's general position be accepted, we think the second step of the argument presents difficulty in application beyond the general terms of the decree below. This promise would afford an added ground, a further buttress, for the refusal to return the property found below to be substantially and equitably that of I.G. But we do not see how it assists the defendant beyond this. Under the Executive definition of a foreign national, so far as here pertinent, it includes other persons only "to the extent" that they acted directly or indirectly for the benefit or on behalf of a foreign national. Where plaintiffs were acting for themselves, as the District Court found with respect to the purchases before 1939, we find nothing in these provisions to bar the plaintiffs from suit. Accordingly we conclude that application of the asserted principle would not change the final outcome of this action.

Thus the same Circuit Court of Appeals which uttered the dictum in the *Silesian-American* case in favor of a Tucker Act remedy as against a §9(a) remedy, not only specifically labels its former utterance a pure dictum, but as effectually as possible repudiates that dictum and expresses its wholehearted approval of the opinion of Chief Justice Groner in the instant case in the court below. In

the light of this action of the Second Circuit Court, every shadow of apparent conflict of decision between that Circuit Court and the Circuit Court of Appeals of the District of Columbia vanishes completely.

Thus the latest pronouncement of the Circuit Court of Appeals should be treated as prevailing. The effect is simply a reversion to and re-approval of the same Court's decision in *Miller, Alien Property Custodian*, v. *Kaliwerke Aschersleben Aktien-Gesellschaft et al*, 283 F. 746 affirming *Garvan, Alien Property Custodian*, v. *Certain Shares of International Agricultural Corporation, etc.*, 276 F. 206. The latter case involved substantially the identical question involved in the present *Silesian-American* case, *supra*, and arrived very logically at the conclusion that the plaintiff in that case had an adequate remedy under Section 9(a) of the Act.

In the portion of the opinion of the Second Circuit quoted above, two references are made to the article appearing in the June 1947 issue of the Yale Law Journal, 56 Yale L. J. 1068. This note is devoted to a discussion of the instant case and the *Silesian-American* case. The note is a very carefully considered and objective analysis of the problem presented. The Court's attention is urgently invited thereto.

At p. 39, footnote 13 of our main brief, reference is made to the letter of Secretary Byrnes submitted to the House Judiciary Subcommittee considering the then pending H.R. 5089. Prior to the submission of that letter a conference was held at the State Department at which representatives of several of the Government agencies were present. Also present was a representative of the Swiss government. At the conference the Swiss government submitted for consideration a copy of the following document as a statement of its position:

Aide-Memoire.

The Sumners Bill H.R. 5089 (Committee Print of May 11, 1946) to amend the First War Powers Act of 1941, provides that a foreign country or national thereof may not institute a suit for *return* of any property or interest vested in the Alien Property Custodian. The sole relief for foreigners—even if they are allied or neutral nationals—would be a suit against the United States in the Court of Claims for *just compensation*.

As already declared during informal conversations between officers of the Legation of Switzerland and the State and Justice Departments, the Swiss Legation feels impelled to point out that the Bill, if enacted, would infringe legitimate rights of Swiss citizens. It will be recalled that Swiss property in the United States was provisionally seized either to protect it or because the interests at stake were ambiguous. The Legation was, however, repeatedly assured that no legitimate Swiss interests would be harmed.

The Swiss authorities therefore venture to expect that Swiss property which by now is either beyond the influence of a state at war with the United States, or which proved to be genuinely Swiss, will be *returned*.

The Bill according to which only property of Americans would be eligible for return, whereas foreigners would be confined to claiming a dollar amount, could hardly be construed otherwise than an act of nationalization. Such a measure would be inconsistent with basic principles inherent in treaties of friendship and commerce and would also be contrary to the promotion of international cooperation, in general, and international trade in particular.

June 24, 1946.
N. 18 Sch/rl

Permission has been given to state that the contents of the foregoing *Aide-Memoire* continues to represent the attitude of the Swiss government.

Respectfully submitted,

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 32-570

SWISS BANK CORPORATION, *Plaintiff*

against

TOM C. CLARK, Attorney General as Successor to the Alien Property Custodian, *Defendant*

OPINION.

Bright, D. J.

Defendant moves for judgment on the pleadings upon the ground that the complaint fails to state a claim upon which relief can be granted, for the reason that it appears that pliantiff is a national of a foreign country whose property the Alien Property Custodian was authorized to vest and retain under § 5(b) of the Trading With the Enemy Act (50 U.S.C.A. App. § 5(b)), as amended by Title III of the First War Powers Act of 1941 (50 U.S.C.A. App. § 616), and under Executive Order No. 9,095 as amended.

Plaintiff claims that it has the right to maintain this action to recover the property mentioned in the complaint under § 9 of the Trading With the Enemy Act.

The complaint is laid under the Trading With the Enemy Act. Plaintiff is a Swiss citizen and not an enemy or the ally of an enemy of the United States or a national of a designated enemy. On April 20, 1946, the Alien Property Custodian served notice upon plaintiff purporting to vest, pursuant to § 5(b) mentioned, shares of common and preferred stock of Schering Corporation, a New Jersey corporation, other shares of common stock of Schering Corporation, a New York corporation, and other shares of common stock of Sherka Chemical Company, Inc., a New York

corporation. On December 1, 1937, plaintiff had loaned Chemical & Pharmaceutical Enterprises, Ltd., another Swiss corporation, 5½ million Swiss francs and had taken as collateral security the stocks mentioned, upon which loan, there remains unpaid over 5¼ million francs, for which plaintiff has a lien upon the collateral mentioned. At the time of vesting, and for a long time prior thereto, the stocks had been registered in the name of Gunther & Co., for the benefit of plaintiff. Without consent of the plaintiff and without making just compensation to it, and upon demand of the Alien Property Custodian, who claimed to be the owner of the stock aforesaid, on or about June 18, 1942, the New Jersey Schering Corporation cancelled the certificates and issued new ones in the name of said Custodian. On August 21, 1945, plaintiff duly made and filed with the Alien Property Custodian a notice of its claim to said securities and property, but made no application for a hearing or to the President, as mentioned in § 9(a). It now prays judgment that the court declare it to be the pledgee of the securities mentioned and entitled to hold the same as collateral to said loan, that defendant has no title or interest therein, that he be enjoined from asserting to have any such, from exercising any rights of ownership or control thereover, from disposing of said securities, and from disposing of or interfering with the rights, patents, and property of the corporations whose securities were thus pledged, and from granting or offering to grant any license with respect thereto. It also prays that the vesting order be declared null, that the defendant be directed to transfer to plaintiff as pledgee the certificate issued to defendant, or, in the alternative, that such certificates be cancelled and the former be reinstated on the books of the corporation. Defendant has joined issue, the answer, besides a general denial, alleging two defenses which are in substance, one of them, that the transactions upon which plaintiff seeks to recover were a cloak to conceal the fact that Schering A. G., a national of Germany, was the real owner of the stock, and

the second, that plaintiff was a corporation incorporated within a country other than the United States and doing business within the territory of a nation with which the United States was at war, and as such was and is an enemy within the meaning of the Trading With the Enemy Act and has no standing to institute or maintain this action.

Section 5(b) as so amended, so far as material here, provides:

> "During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe * * * (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use * * * or exercising any right, power or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes;" * * *

The powers and duties of the President under this section were delegated to, and invested in, the Alien Property Custodian by Executive Order No. 9,095 (7 F. R. 1971 as amended), and it was further provided that any property or interest therein of any foreign country or a national thereof shall vest in the Alien Property Custodian whenever he shall so direct.

It is not questioned that Switzerland was such foreign country, nor that plaintiff was a national thereof.

Section 9 of the Trading With the Enemy Act, under which plaintiff claims, so far as material, provides:

> "(a) Any person not an enemy or ally of an enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him * * * may file with the said Custodian a notice of his claim, under oath and in such form and containing such particulars as the said Custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, * * * to said claimant of the money or other property so held * * *; Provided, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity * * * in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business * * * to establish the interest, right, title or debt so claimed, and if so established, the court shall order the payment, conveyance, transfer, assignment or delivery to such claimant of the money or other property so held by the Alien Property Custodian * * * or the interest therein to which the court shall determine said claimant is entitled."

The vesting order of which complaint is made, dated April 18, 1942 (7 F.R. 2922) states that the Custodian, finds upon investigation that the stock involved was "the property of nationals of a foreign country", and that the action therein taken was in the public interest, and orders and declares that such properties, including all interest therein, were thereby vested in the Custodian, to be held, used, administered, liquidated, sold, or otherwise dealt with in the inter-

est and for the benefit of the United States. It did not find that the stocks were the property of an enemy alien, nor an ally of one, and directed that such property and the proceeds thereof be held in special account pending further determination; and also, "This shall not be deemed to limit the power of the Alien Property Custodian to return such property or the proceeds thereof * * * if and when it should be determined that such return or compensation should be made."

The contention of the defendant is that under § 5(b) and Executive Order No. 9,095, the Alien Property Custodian was authorized to vest property, and that as such vesting order was authorized by law, and, therefore, the title of the Custodian legal, plaintiff cannot maintain the action because it no longer had any interest in the property. It is further contended that, if plaintiff is entitled to any relief or compensation for the property seized, it can recover therefor under the Tucker Act if it shows itself to be a friendly alien. It further contends that § 9(a), under which plaintiff claims the right to maintain the action, is available only to correct seizures made under a mistake of fact or law; in other words, to permit recovery by those as to whom seizure was legally wrong when made.

As before stated, plaintiff claiming not to be an enemy or ally of an enemy, affirms that its only remedy is under § 9(a), § 7(c) of the Trading With the Enemy Act providing: "The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, * * * delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act"; and that because of that limitation, it has no remedy under the Tucker Act.

I think the plaintiff is right. The case of *Uebersee Finanz-Korporation* v. *Markham*, 158 F. (2d) 313, seems to be directly in point. There the complaint was dismissed and that dismissal reversed on appeal. Plaintiff, a Swiss

national, was the owner of stock in sundry American corporations which the Custodian had seized as the property of a foreign national and had vested in himself. Plaintiff sued under § 9(a), alleging that it was not an enemy or ally of an enemy and that the property was not then or any other time held for an enemy or ally of an enemy. The defendant's motion to dismiss was upon the same grounds as here asserted, and it insisted that under § 5(b) the vesting was absolute and not subject to attack, and that plaintiff might obtain just compensation by way of suit in the Court of Claims. It was held that plaintiff's right to recovery was limited by the terms of § 7(c) of the Act to a suit under § (9(a), for only to that extent and in that manner had the United States consented to be sued. It was further decided, answering defendant's contention, that since the amendment of § 5(b), § 9(a) was no longer applicable, that the amendment to § 5(b) did not repeal, expressly or impliedly, the existing terms of § 9(a), and, reading them together, the two sections did not conflict but constituted a reasonable program to meet the emergency of the war.

The determination there made, that § 9(a) allows any person not an enemy or an ally of an enemy to sue the Custodian in the federal courts, had previously been upheld in *Markham* v. *Cabell*, 326 U. S. 404, 410, where Mr. Justice Douglas wrote:

> "The right to sue, explicitly granted by § 9(a), should not be read out of the law unless it is clear that Congress by what it later did withdrew its earlier permission. We can find no indication in the 1941 legislation that Congress by amending § 5(b) desired to delete or wholly nullify § 9(a). On the contrary, the normal assumption is that where Congress amends only one section of the law leaving another untouched, the two were designed to function as parts of an integrated whole.'

That suit under § 9(a) is plaintiff's only remedy, limited as such by the provisions of § 7(c), was long since decided

in *Becker Co.* v. *Cummings*, 296 U. S. 74, 79; which also held that the provisions of § 9(a) must be broadly construed to give effect to its remedial purpose. (p. 80). And it has been held that plaintiff here would have no remedy in the Court of Claims. *Escher* v. *United States*, 68 Ct. Cls. 473, 478, cert. denied 281 U. S. 752. See also *Josephberg* v. *Markham*, 152 F. (2d) 644, 649; *Dracger Shipping Co.* v. *Crowley*, 49 F. Supp. 215, 218.

It would seem that the title vested in the Custodian is but a defeasible one subject to being divested by a proper suit under § 9. *Central Trust Co.* v. *Garvan*, 254 U. S. 554, 567, 569; *Salamandra Insurance Co.* v. *New York Life Insurance & Trust Co.*, 254 Fed. 852, 860. I do not think *Silesian American Corp.* v. *Markham*, 156 F. (2d) 793 is controlling.

The motion is denied.

JOHN BRIGHT
United States District Judge

August 15, 1947